STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2006
v	No. 260154 Wayne Circuit Court
JUSTIN JOHN WOOD, Defendant-Appellant.	LC No. 04-008748-02

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of bank robbery, MCL 750.531. He appeals as of right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

John Malone presented a note to a bank teller advising the teller that he was robbing the bank and directing her to put money in a bag. Once she handed him the money, he fled and was observed entering the passenger side of a car owned by defendant's brother, Kenneth Wood. The driver of the car was not identified by eye-witnesses, but David Branch testified that defendant later admitted that he was the one who robbed the bank, and that Kenneth was only covering for him. At trial, defendant argued that the proofs had not established he was the driver beyond a reasonable doubt, and that, based on the proofs, it was just as plausible that Branch or Kenneth was the driver. Kenneth admitted that he had tried to establish a false alibi, and told the individuals who were to provide the alibi that there had been a robbery. In statements to police, these individuals said that Kenneth had told them that he was involved in the robbery. At trial, they indicated that he only said that there was a robbery. Kenneth testified that he was at home at the time of the robbery with defendant, who was sleeping.

Defendant argues that his right to a fair trial was compromised by the prosecutor's use of Kenneth's statement to an officer—that he did not want to get his brother in trouble—as substantive evidence. We disagree. We review for abuse of discretion a trial court's decision on evidentiary matters. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). Defendant argues that the prosecutor only proffered the evidence for impeachment, so the prosecutor's later use of the hearsay as substantive evidence was improper. It is true that when defense counsel objected to this testimony on hearsay grounds, the prosecutor indicated that he was only seeking to impeach Kenneth's testimony with the statement. Kenneth had testified that he never told a police officer that he was covering for defendant. After the officer testified that

Kenneth told him he did not want to get his brother into trouble, defense counsel objected again, arguing that the statement did not impeach Kenneth's denial that he told a police officer he was "covering" for his brother. The trial court found that the statement was admissible because it was not hearsay under MRE 801(d)(1). Defendant makes no argument that the ruling based on MRE 801(d)(1) was erroneous. Since the evidence was found to be a non-hearsay statement, its admissibility is not limited to impeachment, and the prosecutor could use the evidence to argue that defendant's brother did not want to get defendant in trouble.[1]

Defendant also argues that the issue of credibility was "closely drawn," so *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), overruled 472 Mich 130 (2005), required the trial court to give a sua sponte cautionary instruction on the unreliability of David Branch's accomplice testimony. However, even if *McCoy* was still valid law, an instruction was not required in this case because there was no evidence that Branch was an accomplice. An accomplice is one "concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission . . . ." MCL 767.39. In this case, neither side presented any evidence that Branch procured, counseled, aided, or abetted the commission of the bank robbery, so the accomplice instruction was unwarranted.

Defendant next argues that he was denied the effective assistance of counsel because his counsel failed to request an accomplice cautionary instruction. We reject this argument, because defendant would not have been entitled to an accomplice cautionary instruction without some evidence that Branch was an accomplice. However, defendant also argues that his attorney failed to pursue an alibi defense despite Kenneth's testimony that defendant was at home sleeping. We disagree. To establish ineffective assistance, a defendant must demonstrate that counsel's errors so prejudiced the defense that defendant was deprived of a fair trial. *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). In this case, the prosecutor called Kenneth, and between the prosecution's direct examination and defense counsel's cross examination, Kenneth testified to all the circumstances surrounding his contention that he and defendant were at home sleeping while the robbery was taking place. In other words, the record reflects that defendant was able to present all the substantive testimony underlying his alibi defense despite the fact that defense counsel did not call any alibi witnesses. Therefore, defendant fails to demonstrate how his defense was prejudiced by his trial counsel's method of presentation.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

[1] We note that whether the trial court's analysis of the statement under MRE 801(d) is accurate, the statement fits well within the exception of admissible hearsay anyway as a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . ." MRE 803(3). Because the evidence was admissible under this section, the prosecutor did not impinge on defendant's right to a fair trial by arguing this evidence to the jury.